Federal Court Cour fédérale

Date: 20210803

Docket: T-938-19

Citation: 2021 FC 812

Ottawa, Ontario, August 3, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

4431472 CANADA INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, 4431472 Canada Inc. [443 Inc] is seeking judicial review of a decision of the Canada Revenue Agency [CRA] dated May 7, 2019 [Decision], whereby the Minister of National Revenue [Minister] confirmed her decision not to proceed with the processing of amended tax returns filed by 443 Inc in respect of its 2008 to 2011 taxation years.

[2] In short, I find the wording of the Decision is unclear and open to two diametrically opposed interpretations as regards the core issue between the parties. As such, it is unintelligible and therefore must be set aside as being unreasonable. Consequently, I am allowing this application.

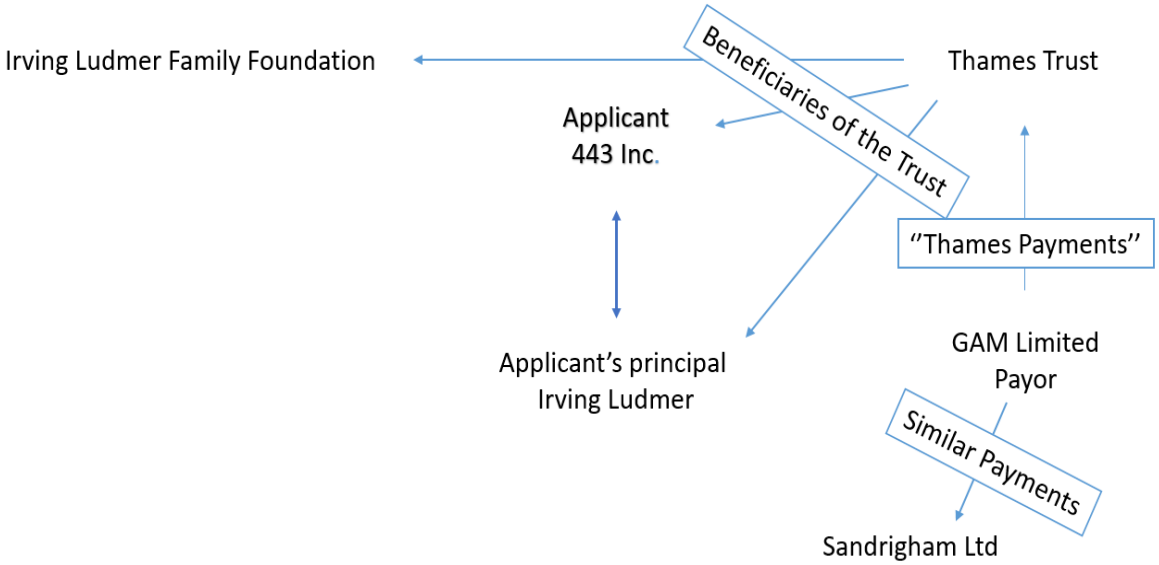
II. Facts

[3] Irving Ludmer is the principal and sole shareholder of 443 Inc, a holding company with no operating business. 443 Inc is one of the beneficiaries of the Thames Trust, a discretionary trust settled in 2007 under the laws of Alberta [Thames Trust]. Since its establishment, the Thames Trust has received significant payments from Bermuda-based GAM Ltd, and then made distributions of the trust property to, among others, 443 Inc.

[4] Mr. Ludmer, along with related entities, has been involved in a dispute with the CRA with respect to his tax liability under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], at least as far back as 2009, including litigation before the Tax Court of Canada [TCC] and before this Court. Matters became so arduous and frustrating for Mr. Ludmer that on March 5, 2013, he along with 443 Inc and several companies (owned and controlled by either him or his immediate family) instituted proceedings in the Superior Court of Québec seeking damages against the CRA and the Minister alleging that the CRA had engaged in abusive audit practices and applied invented taxation regimes to the Plaintiffs' investments in a related entity in its attempts to impose tax liability and penalties upon them [Superior Court Action]. In the end, the Plaintiffs, including Mr. Ludmer and 443 Inc, were awarded over $4.8 million in damages, plus interest and costs (*Ludmer c Attorney General of Canada*, 2018 QCCS 3381; appeal dismissed, *Ludmer c*

Attorney General of Canada, 2020 QCCA 697; leave to appeal to the Supreme Court of Canada denied, *Irving Ludmer, et al v Attorney General of Canada, et al*, 2021 CanLII 15593 [SCC]).

[5] The present application before the Court arises in the context of the ongoing audits and reassessments by the CRA of several related taxpayers including, amongst others, Mr. Ludmer, 443 Inc and the Thames Trust, in respect of payments derived from foreign entities including GAM Ltd and Sandringham Limited, a company incorporated under the laws of Bermuda and controlled by, among others, Mr. Ludmer through an offshore holding company and offshore trust [Sandringham Ltd]. For ease of reference, I include the figure below to illustrate the relationship between the different taxpayers:



[6] From 2007 to 2015, the Thames Trust received regular payments from GAM Ltd totalling $23,008,238 [Thames Payments] and made distributions to its beneficiaries, including to 443 Inc, from 2008 to 2011, and in 2014 and 2015, totalling $17,629,808 [Distribution].

[7] For the 2008 to 2011 taxation years, 443 Inc filed T2 tax returns reporting the Distributions it received as taxable income. The Minister assessed 443 Inc in accordance with its filing position for the relevant taxation years; 443 Inc never objected to the original assessments under subsection 165(1) of the ITA. However, in November 2010, according to 443 Inc, it discovered that the Distributions had been mischaracterized and should have been treated as non-taxable voluntary payments, thereby affecting the taxability of the Distributions.

[8] As a result, in April 2011, 443 Inc filed requests for refunds and submitted amended T2 tax returns for the 2008 to 2010 taxation years, taking the position that the Thames Payments were not income from a source within the meaning of the ITA. The amended returns did not report any taxable income in respect of the Distributions received by 443 Inc during that period.

[9] In respect of the 2011 taxation year, as it had not received a response from the Minister regarding its amended returns for the 2008 to 2010 taxation years, 443 Inc – in what it calls an abundance of caution – reported the Distributions received during 2011 as taxable income, and in June 2012 filed a request for a refund along with an amended tax return.

[10] I will refer to all of the amended returns for taxation years 2008 to 2011 as the "Amended Returns". The refunds claimed by 443 Inc by way of the Amended Returns, not including accrued interest, totalled $2,788,035.

[11] By 2012, the Minister had begun an audit of Sandringham Ltd [Sandringham Audi] in respect of similar previous payments it had received from GAM Ltd [Sandringham Payments] up

until 2007. The structure was then "Canadianized" with the establishment of the Thames Trust which received the Thames Payments from GAM Ltd as of 2008, while Distributions continued to flow to 443 Inc –initially via Sandringham Ltd, and as of 2008 via the Thames Trust. In the context of that audit, the Minister looked into whether the Sandringham Payments constituted income that could be attributed to a non-resident trust or were subject to Canadian tax.

[12] I understand that taxation years 2012 and 2013 are not in issue. For the 2014 and 2015 taxation years, 443 Inc filed tax returns on the basis that the Distributions did not constitute income from a source and were therefore not taxable. The Minister eventually reassessed 443 Inc for those two years on the basis of the Distributions being taxable income. 443 Inc filed notices of objection; as of the date of the hearing, 443 Inc had not appealed to the TCC.

[13] Clearly, the Sandringham Audit and the audit of Mr. Ludmer, as well as the ongoing matters involving the Thames Trust and 443 Inc, are interrelated; the common issue is whether the Sandringham Payments and the Thames Payments constitute income and are thus taxable in the hands of either 443 Inc or Mr. Ludmer, if at all [common issue].

[14] As for Mr. Ludmer, after being reassessed on August 31, 2018, under what has been described as the "Principal Theory" for having failed to include the payments originating from GAM Ltd as part of his income for the 1995 to 2015 taxation years, he eventually appealed to the TCC. I understand that the outcome is expected to be one of the things that will determine the validity of the taxing position taken by the CRA in the Sandringham Audit and the remaining matters regarding the related taxpayers, including 443 Inc.

[15] Therefore, the crux of this application for judicial review relates to the Minister's treatment of the Amended Returns for the 2008 to 2011 taxation years.

[16] From 2012 to 2014, 443 Inc regularly followed up with the Minister on its requests for refunds for the 2008 to 2011 taxation years, and went as far as to submit an opinion from a former Chief Justice of the TCC to the effect that the Thames Payments were non-taxable capital receipts – voluntary payments – not considered to be income from a source, and thus did not have the "quality of income". As consideration of the Amended Returns involved analysis of the taxability of the Thames Payments as well as the related and ongoing Sandringham Audit, suffice it to say that the Minister did not provide a direct and timely response to 443 Inc's requests for refunds, nor did she issue new notices of assessment for the 2008 to 2011 taxation years to 443 Inc. In the meantime, the Superior Court Action was instituted in March 2013.

[17] On May 16, 2014, the CRA sent a proposal letter to Mr. Ludmer taking the position that the Sandringham Payments, and thereafter the Thames Payments, were to be considered as income from a source within the meaning of paragraph 3(a) of the ITA and income from property or business within the meaning of subsection 9(1) of the ITA, and were thus taxable for Canadian tax purposes. There were further exchanges between the parties debating the issue, but the CRA reaffirmed its position in letters dated December 1, 2014, and June 22, 2016.

[18] On July 6, 2017, the CRA sent to tax counsel for 443 Inc and the other related taxpayers (including Mr. Ludmer) a proposal letter in which it maintained its position regarding the characterization of the Sandringham Payments and the Thames Payments as taxable receipts that

are subject to Canadian tax. Accordingly, the CRA proposed to disallow the deductions claimed by the Thames Trust for its 2011 and subsequent taxation years. As stated earlier, the CRA's proposal would have a downstream effect on how the Amended Returns would be treated as regards the Distributions received by 443 Inc.

[19] In particular, and relevant to this application, the proposal letter of July 6, 2017, also stated that in respect of 443 Inc's requests for refunds and the processing of the Amended Returns, the CRA would not make a decision "until a final and unappealable determination [had] been made/reached on the issue of the taxability" of the Thames Payments received by the Thames Trust in its 2011 and subsequent taxation years. By "final and unappealable determination", I assume the CRA was referring to the proceedings before the TCC.

[20] Also, of some significance is the fact that the CRA concluded the proposal letter by stating:

> Please note that subsections 9(1) and 56(2) are alternate assessing positions that are being put forth. In situations such as this, the CRA will pursue both positions until such time as the applicability of the provisions is agreed upon by the parties involved or concluded through the objections or appeal process.

[21] Under subsection 9(1) of the ITA, 443 Inc would be liable for the tax on the amounts received from the Thames Trust because the Distributions went directly to 443 Inc [Applicant Theory]. In contrast, under subsection 56(2) of the ITA, the Sandringham Payments and the Thames Payments would have been made at the direction, or with the concurrence, of Mr. Ludmer, for his benefit or as a benefit he desired to have conferred on the recipient [Principal Theory], in which case Mr. Ludmer would be directly liable for paying the taxes on

the Sandringham Payments and the Thames Payments, which would be income to him personally.

[22] In short, although these positions are ultimately inconsistent, the CRA was applying alternative assessing positions, and did not intend to treat these two tax positions as mutually exclusive until the issue as to the taxability of the payments originating from GAM Ltd had been resolved. 443 Inc concedes that the CRA had the right to take alternative assessing positions, but only, it says, until there has been a final determination on one of these positions.

[23] 443 Inc argues before me that now that the Minister has rendered her Decision not to reassess 443 Inc, a decision which is arguably now, as discussed further below, *res judicata*, subject only to a possible remission order, a "final determination" as to the treatment of the 2008 to 2011 taxation years has indeed been made so as to extract the taxes payable on the Distributions from 443 Inc; the CRA should therefore abandon its reassessment of Mr. Ludmer regarding the 2008 to 2011 period and acquiesce to his position on his appeal in relation to that period, and "not tax the same money twice".

[24] In any event, a little over a year later, on July 31, 2018, the Superior Court of Québec rendered its decision in respect of the Superior Court Action. Although the court found fault with the CRA in the manner in which, amongst others, 443 Inc had been treated during the ongoing Sandringham Audit and *Access to Information Act*, RSC 1985, c. A-1, proceedings, the judge declined to award 443 Inc the refunds it also sought as a related matter in respect of the Amended Returns. The judge stated:

> [818] With respect to the tax refunds claimed by 4431472 and 4431481, the Court will not intervene at this time to order that the refunds be paid.
>
> [819] First, the issue as to whether the refunds are due has not yet been decided by any court. It is essentially the same issue as the larger Sandringham issue and the CRA seems to be postponing the consideration of the refund issue until the Sandringham issue is resolved. The amended returns for taxation years 2008 to 2010 were filed on April 27, 2011, and the amended returns for taxation year 2011 were filed on June 7, 2012. The Court is concerned about the CRA postponing indefinitely the consideration of whether the refunds are due. It seems that the CRA should at least refuse the refunds to allow [443 Inc] to appeal to the Tax Court. Again it might be appropriate to proceed by mandamus, but that issue was not argued. As a result, it would not be appropriate for the Court to issue any order.
>
> [Emphasis added.]

[25] Following the decision in the Superior Court Action and further discussions between counsel, the CRA issued reassessments in respect of payments from GAM Ltd to Sandringham Ltd and the Canadian structures. In particular, and as stated earlier, on August 31, 2018, the Minister issued notices of reassessment against Mr. Ludmer based on subsection 56(2) of the ITA for having failed to include those payments in his income for the 1995 to 2015 taxation years; Mr. Ludmer has filed notices of objection and appealed to the TCC.

[26] Regarding the Amended Returns, the CRA wrote to tax counsel for 443 Inc on November 13, 2018, stating, once again, that a decision regarding the processing of the Amended Returns and the requests for refunds would be postponed until a final determination had been made, supposedly by the TCC or by agreement between the parties, as to whether the payments emanating from GAM Ltd were taxable and, if so, in whose hands.

[27] The CRA's position to postpone the processing of the Amended Returns was unacceptable to 443 Inc. Ultimately, what 443 Inc was insisting upon was for the CRA to process the Amended Returns, issue notices of reassessment, and to have the issue of the treatment of its Amended Returns determined in a judicial forum. Sensing an impasse, on February 20, 2019, 443 Inc filed with this Court an application seeking an order of *mandamus* (T-338-19) to compel the Minister to process and determine its tax liability for the 2008 to 2011 taxation years based on the Amended Returns, and to issue refunds in accordance therewith.

III. The decision of the Minister dated May 7, 2019

[28] It would seem that the application for a *mandamus* order brought the need to make a decision on dealing with the Amended Returns to the forefront of the Minister's mind, and on May 7, 2019, the CRA issued the Decision which provided in general terms, and I paraphrase:

> (i) As a result of the audit of, among others, 443 Inc, the Minister has determined that 443 Inc's initial filing position, *to wit*, that the receipts from the Thames Trust were income, was the correct position at law: as previously set out by the Minister in earlier correspondence, given that such receipts were taxable in accordance with section 3(a) and section 9(1) of the *ITA*, they were properly reported as income in 443 Inc's initial filings for the relevant period;
>
> (ii) As a result, the CRA is not bound to process the Amended Returns as requested and to exclude these receipts in computing 443 Inc's income for the relevant period;
>
> (iii) Given the ongoing dispute, the CRA had initially agreed, to the benefit of 443 Inc, to postpone its final decision on the issue of the Amended Returns until a final resolution of all related tax matters had been determined, however given the application for a *mandamus* order, the CRA decided to make a final decision on the Amended Returns, that is, not to reassess 443 Inc. Accordingly, the CRA will not accept the Amended Returns, and the initial assessment of 443 Inc will not be changed.

[Emphasis added]

[29] 443 Inc concedes that the CRA is not obliged to process the Amended Returns, however it argues that it should nonetheless proceed to do so in line with its internal procedure found in its Information Circular IC75-7R3 dated July 9, 1984, which calls for reassessments to be made upon receipt of a written request by the taxpayer, and that the CRA should not simply sit on the Amended Returns as it has been doing.

[30] In response, the Minister argues that the CRA was fully justified in deciding not to process the Amended Returns; in short, the Minister argues that where she is not satisfied that her previous assessment position based upon 443 Inc's initial returns was wrong, as is the case here, the policy governing reassessment does not apply (see IC75-7R3 at paragraph 4(b)). Consequently, there was no obligation to issue notices of reassessment to 443 Inc. I take it that the Minister was not swayed by the expressed preference of the judge in the Superior Court Action that the CRA do so as to start a process to eventually allow 443 Inc to have recourse to a judicial determination of the issue.

[31] In short, the Minister says that 443 Inc's change of heart after it filed its initial returns on the basis that the Distributions were taxable income, with no change in circumstances, is unconvincing, and that 443 Inc's pleas of "error" in its initial filings and claim that the Distributions were actually not income and thereby not taxable, are insufficient reason by themselves for the Minister to exercise her discretion to reassess 443 Inc.

[32] Moreover, the reason why the CRA states in its Decision that its earlier proposal to postpone its review of the Amended Returns was "to the benefit of 443 Inc" is explained in the September 29, 2020, affidavit of Mr. Jeffery Zucker, Team Leader, National Aggressive Tax Planning Directorate, International, Large Business and Investigations Branch, filed in support of the Minister's position. Mr. Zucker states at paragraph 30:

> The CRA chose to delay the confirmation of its protective assessing position (taxation of the GAM Payments in [443 Inc's] hands) during the audit, (*sic*) because if the Tax Court of Canada had eventually rejected [the Minister's] position for the 2014 and 2015 taxation years, the CRA would not have been able to go back and adjust [443 Inc's] 2008-2011 taxation years accordingly, due to the limitation period.

[33] In short, the Minister argues that now that her decision not to process the Amended Returns has been definitively made with the issuance of the Decision, the issue of the reassessment of 443 Inc is *res judicata* (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 (CanLII), [2003] 3 SCR 77 at para 23), and short of an order on my part to set the Decision aside, or a remission order under section 23 of the *Financial Administration Act*, RSC 1985, c F-11, the Minister is now *functus officio*; she is no longer able to proceed with eventually processing the Amended Returns and issue the requested refund to 443 Inc should the common issue eventually be resolved in favour of the taxpayers and 443 Inc was successful in its objection to the reassessments for its 2014-2015 taxation years (*Chandler v Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848 at pp 861-863).

[34] 443 Inc argues forcefully that what we are witnessing is a petulant CRA not following its past practice of reassessing in similar circumstances simply because the request comes from Mr. Ludmer; that CRA's paternalistic attitude is misplaced; and that it, 443 Inc, should be

allowed to pursue its rights in the manner it wishes and not be told to "simply wait" and that it should "trust the CRA". 443 Inc adds that the Minister's true objective in refusing to reassess 443 Inc was to retain the entire $2,788,035 first paid by 443 Inc with its initial filings rather than the Minister having to return half of the amount – which she would have to do in the event 443 Inc files notices of objection to any reassessment – pending the objection process running its course in the parallel tax matters. According to 443 Inc, this is tantamount to a seizure before judgment.

[35] I do not follow 443 Inc's argument here. It seems to me that if the CRA wanted to "stick it" to Mr. Ludmer, they would have confirmed several years ago that they would definitively not reassess 413 Inc on the basis of the Amended Returns. The CRA certainly did not need the application for *mandamus* to do that, if in fact that was its intention. Rather, delaying the decision that was ultimately made until her hand was forced with the application for an order for *mandamus* would seem to support the Minister's position, that is if she locked herself into a final position on whether to reassess 443 Inc, as she now has with the issuance of the Decision, the CRA would be unable to simply press the reset button and eventually process the Amended Returns and requests for refunds in accordance with the outcome on the common issue.

[36] To be clear, and as stated earlier, what 443 Inc is ultimately looking for is to have the issue of the treatment of its Amended Returns determined in a judicial forum. It argues that as long as the CRA continues to refuse to do, or even postpone doing, the reasonable thing and issue notices of reassessment for the 2008 to 2011 taxation years, 443 Inc remains trapped with the "error" n its initial tax filings. This deprives 442 Inc of any recourse to file notices of

objection and eventually to appeal to the TCC, all the while with the CRA holding on to its money.

[37] In any event, it is this Decision that is the subject of the present application for judicial review. With the parties' consent, on June 6, 2019, this Court stayed the application for a *mandamus* order in T-338-19 pending the outcome of this application.

IV. Issues

[38] As filed, this application seeks not only an order setting aside the Decision, but also an order of *mandamus* to compel the Minister to make a determination under section 164 of the ITA with respect to the Amended Returns, consistent with her administrative practice in respect to subsection 56(2) of the ITA. However, the application for a *mandamus* order was not pursued before me, thus the only issue is whether the Decision should be set aside and sent back for redetermination.

V. Legal Framework

[39] The applicable legal framework for reassessments is found, among others, in subsections 152(4) and (8) of the ITA:

Assessment and reassessment	**Cotisation et nouvelle cotisation**
(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable	(4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les

under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if	intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :
(a) the taxpayer or person filing the return	a) le contribuable ou la personne produisant la déclaration :
(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or	(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,
(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;	(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au contribuable pour l'année;
[…]	[…]
Assessment deemed valid and binding	**Présomption de validité de la cotisation**
(8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and	(8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une

subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.	opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

VI. Standard of Review

[40] The parties agree that the applicable standard of review is reasonableness. As there is no reason to depart from the presumptive standard set out by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], I agree.

VII. Analysis

A. *Preliminary issue*

[41] I agree with the Minister's submission, with which 443 Inc also agrees, that the Attorney General is the proper Respondent in these proceedings pursuant to subsection 303(2) of the *Federal Courts Rules*, SOR/98-106. The appropriate Order will be issued.

B. *Is the Decision reasonable?*

[42] 443 Inc makes two arguments to support its contention that the Decision is unreasonable.

[43] First, 443 Inc argues that although the Decision suggests that the CRA's position not to reassess 443 Inc is final, it is not final in actual fact, and the CRA still intends to eventually process the Amended Returns on the basis of the TCC's determination regarding the tax treatment of the Sandringham Payments and the Thames Payments, and the Distributions to 443 Inc and Mr. Ludmer.

[44] The Minister argues that the Decision was indeed final, and states that any suggestion to the contrary is taken out of context.

[45] Secondly, 443 Inc argues that if a "final decision" not to reassess 443 Inc, the Decision was arrived at on the basis of flawed reasoning and deviates from the established internal CRA practice of not assessing the same income twice, that is, in the hands of 443 Inc, on the one hand, under what has been described as the Applicant Theory and, on the other, in the hands of Mr. Ludmer by way of his notices of reassessment in line with what has been described as the Principal Theory. According to 443 Inc, this is also contrary to the principle that the CRA cannot take inconsistent positions in respect of taxpayers.

[46] The policy set out in Interpretation Bulletin IT-335R2 states:

> 13. An amount to which subsection 56(2) applies could be included in the income of both the taxpayer and the person who receives the payment or the property. <u>However, it is normally the Canada Revenue Agency's (CRA) practice not to assess the same income twice.</u>
>
> [Emphasis added.]

[47] The Minister argues that inconsistency in assessments is not proof that any particular assessment is incorrect, and that she is justified in issuing alternative (or protective) assessments until the issue of the taxability of the payments is finally resolved (*Hawkes v R*, 1996 CanLII 3936; CarswellNat 2206 at paras 7-10, 14 (FCA); *McAdams v Canada*, 2014 FCA 99 at para 5; *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 at paras 77-79; *Ludmer v Canada*, [1995] 1 FC 3 at paras 8-9 (FCA)).

[48] 443 Inc adds that given the Minister's position that the consequences of the issuance of the Decision – a final decision not to reassess – would mean that she would not be able to revisit her treatment of the Amended Returns in the event of the common issue eventually being determined in 443 Inc's favour, there is a heightened duty on the part of the Minister to consider the implications of what the CRA is doing, not only in respect of its application of the policy which provides that both Mr. Ludmer and 443 Inc not get taxed on the same funds, but also in respect of the overall policies and guidelines, and the objectives of the ITA.

[49] 443 Inc stresses that where the CRA does depart from established policy, it has to explain why it is doing so (*Vavilov* at para 131); in this case, it did not. The Minister broke from a publicly available policy not only by assessing the same income twice, but also by collecting it from 443 Inc while at the same time reassessing and seeking payment from Mr. Ludmer. In fact, according to 443 Inc, it is clear from the cross-examination of Mr. Zucker that the CRA did not even consider the policy when it issued the Decision, and when he was asked to explain why he did not follow IT-335R2, Mr. Zucker responded that "the information IT bulletin is not law, its just something that is there, and I did not take that into consideration".

[50] The Minister takes the position that the CRA does not have to consider the policy because it simply does not apply in this case. Consequently, there is nothing to explain.

[51] Given my decision regarding 443 Inc's first argument, I need not directly address the second argument.

(1) Should the Decision be treated as final

[52] In reviewing the matter, it seems to me that the issue as to whether the Decision is final or not as regards the reassessment of 443 Inc is somewhat of a red herring in respect of 443 Inc's ultimate goal of moving the issue forward; whether the Decision is final or not, unless notices of reassessment for taxation years 2008 to 2011 are issued to 443 Inc, it cannot move the issue forward so as to have the TCC deal with its eventual tax liability as regards the Distributions.

[53] Put another way, whether the Decision is a final decision not to reassess 443 Inc, or a final decision to "postpone" the reassessment until the common issue is dealt with by the TCC in the related matters, changes nothing for 443 Inc.

[54] That said, I nonetheless think it important for me to deal with this first issue as it may well have an impact not only on whether the CRA can eventually revisit its position as regards the Amended Returns once the common issue is resolved, but also on how I am to deal with the remaining issues raised by 443 Inc in this application, if at all.

[55] One way to read the Decision is that the Minister made a final decision not to reassess 443 Inc; pressed to take a position on the Amended Returns on account of the application for *mandamus*, the Minister made a decision in line with its previous proposals, *to wit*, not to reassess 443 Inc on the basis of the Amended Returns. The Decision states that given the application for the order of *mandamus*, "the CRA has decided to take and communicate by way of this letter a final decision on the amended returns and it has decided not to reassess the taxpayer in accordance with the amended returns. Accordingly, the initial reassessment which accepted the taxpayer's original returns as filed, will not be changed […]. In summary, the CRA will not accept the Amended Returns."

[56] This, of course, is one way to read the Decision – the Minister has decided not to reassess 443 Inc in line with the Amended Returns because she disagrees in law with the taxpayer's revised position, and that this decision is final. No doubt the CRA was dealing with a two-tiered decision-making process: first, it had to decide to address the issue of the Amended Returns, something that seems to have been triggered by the application for *mandamus*. Then the CRA had to decide whether it would process the Amended Returns and issue notices of reassessment to 443 Inc; it seems the Minister decided that issue in the negative, that is not to reassess, and that her decision not to do so was final.

[57] However, circumstances would have one question interpreting the Decision in this way.

[58] Early on, the Minister filed a motion seeking to stay the present application on several grounds. In doing so, she stated that, in any event, her intention was to treat the Amended

Returns in the same manner she would treat the payments made during 443 Inc's 2014 and 2015 taxation years and for which notices of objection have been filed – I assume once the matter regarding the common issue is resolved either by agreement or by decision of the TCC (see Order of Prothonotary Steele in respect of the Minister's motion to stay at paragraph 10).

[59] Read in this way, it would therefore seem as though the decision not to reassess 443 Inc in accordance with the Amended Returns, as set out in the Decision, was not final. Rather, what was taken as a final decision was simply the firming up of the earlier CRA proposal that the processing of the requests for refunds by 443 Inc would be postponed pending a final resolution of what has been identified as the common issue. This interpretation is consistent with Mr. Zucker's affidavit dated August 12, 2019, in support of the Minister's motion to stay, where he stated:

> [26] On May 7, 2019, the Minister denied the Applicant's reassessment request for the taxation years 2008, 2009, 2010, and 2011 […]
>
> […]
>
> [29] It is the CRA's intention to treat the Applicant's reassessment request consistently with the final outcome of the objection/appeal process for the reassessments of the Applicant's 2014 and 2015 taxation years…that will determine whether the GAM Payments are taxable and in whose hands.
>
> […]
>
> [31] If this Application is suspended and the final outcome of the objections/appeal process is to the effect that the GAM payments should not be included as income in the hands of the Applicant, the Minister intends to reassess the Applicant's income for the 2008 to 2011 taxation years accordingly.
>
> [Emphasis added.]

[60] When cross-examined on this portion of his affidavit on September 10, 2019, Mr. Zucker testified along the same lines, i.e., notwithstanding the Decision, the CRA still intended to process the Amended Returns on the basis of the outcome of the eventual tax appeals in respect of 443 Inc's 2014 and 2015 taxation years:

> Q-So, whatever the decision is with respect to the two thousand and fourteen (2014), two thousand and fifteen (2015) years, it is the CRA's intention to apply that to the two thousand and eight (2008) and two thousand and eleven (2011) years as well?
>
> Correct.
>
> […]
>
> Q-So, when you wrote [the Decision], you still had the intention of treating the amended returns consistently with all taxpayers based on their treatment at the end of the appeals process?
>
> A-Yes.
>
> Q-It was not, as far as you were concerned, a final decision finally determining the rights of 443 under the amended returns?
>
> A-The Minister has engaged to wait until a final and unappealable decision has been rendered by the court to determine whether or not, you know, the amended returns will be processed.
>
> Q-Can you explain why you use the term "final decision" in this letter?
>
> A-The final decision is that we are not proceeding with the processing of the taxpayer's request of his amended returns until, as we've stated through our correspondence, that we are waiting for a final and…final decision on this case before the Appeals Division and/or the court system.
>
> Q-You agree with me that it doesn't say that anywhere in the letter?
>
> A-No.
>
> […]
>
> Q-And then, the next sentence [referring to the Decision]:

> Given the recent application to Federal Court for a mandamus order, the CRA has decided to take and communicate by way of this letter a final decision.
>
> That wasn't your way of communicating to the taxpayer that this is a final decision?
>
> A-It's a final decision as it stands at that point in time whereas we will respect the process of, you know, the taxpayer's right to file this mandamus, a decision will be granted. Either way, we will respect that decision, appeal it […] I don't know the procedure, honestly, but at some point in time there will be a final resolution, to which the Minister will respect that and act accordingly.
>
> [Emphasis added.]

[61] So according to Mr. Zucker, reference to the Decision being "final" was not in relation to whether the CRA would or would not reassess 443 Inc, but rather related to the postponement of the processing of the Amended Returns. In other words, and to go back to the issue of whether the Minister can take alternative taxing positions, the issue as to whether the money in the hands or either 443 Inc of Mr. Ludmer is taxable has not been finally resolved. The difference here, of course, is that we are not simply dealing with alternative assessing positions, but rather with the fact that the CRA has already received full payment of the taxes for the 2008 to 2011 taxation years in accordance with one of those positions with the initial assessment of 443 Inc.

[62] The Decision can be read both ways.

[63] Before me, the Minister argued that the Decision is final in respect of her position not to reassess 443 Inc, and explained that Mr. Zucker's seemingly contradictory statements regarding the Minister's eventual intention to nonetheless treat the Amended Returns on the basis of the final determination of the common issue were made in the context of her motion to stay. If I

understand the Minister correctly, what she is arguing is that somehow, success on her motion to stay would create a situation where she is no longer *functus officio* and if the present application was stayed, she would then be able to revisit the issue of the Amended Returns notwithstanding the issuance of the Decision.

[64] I cannot follow the Minister's argument. Either the issuance of the Decision had the effect of rendering the Minister *functus officio* or it did not, and the success or failure of the motion to stay these proceedings should be of no consequence to that determination. Having read the sections of the transcript of Mr. Zucker's cross-examination, and having read his affidavit in support of the said motion, he clearly states that the Minister's intention to eventually reassess 443 Inc on the basis of the final determination of the common issues continued beyond the issuance of the Decision. At least that was the message he wanted to convey in drafting the Decision.

[65] Mr. Zucker's testimony on cross-examination is at odds with what the Minister is arguing before me, i.e., that she had no obligation to issue notices of reassessment to 443 Inc, and that now that she has rendered her decision to not reassess 443 Inc, she can no longer revisit the issue in line with the final determination of the common issue.

[66] The trouble I have in determining whether or not the Decision is reasonable is that it is not clear what the Decision actually says. I cannot decide whether the Minister's position not to reassess 443 Inc is reasonable, or whether it is reasonable for her to conclude that she has no obligation to reassess or whether she has failed to follow her own internal policy without

explaining why, because the Minister is not clear as to whether she is refusing outright to exercise her discretion to reassess 443 Inc, or whether she is simply crystalizing and making "final" her earlier proposal to postpone her decision on processing the Amended Returns until the common issue has been dealt with.

[67] I must say that the Minister's arguments before me leaves me somewhat perplexed.

[68] In addition, I do not think it is for me to interpret the Decision, one way or the other. Either the Decision is clear, or it is not. Here, it is not, and I am afraid that the Decision is therefore neither transparent nor intelligible, and consequently, cannot be reasonable.

[69] My finding on this issue is sufficient to dispose of the application for judicial review.

[70] Costs are payable by the Respondent to the Applicant.

VIII. Conclusion and remedial discretion

[71] As drafted, the Decision is open to two different interpretations, and as such, must be set aside as being unreasonable. The issue now is whether I send the matter back to the CRA for redermination.

[72] The Supreme Court in *Vavilov* has held that as a general rule, courts should respect "the legislature's intention to entrust the matter to the administrative decision maker", however certain factors may exist and be influential in the exercise of remedial discretion (*Vavilov* at

para 142). In the present case, I have decided to set the Decision aside, but will not order that the matter be returned to the CRA for redetermination at this time.

[73] If I am to set the Decision aside, 443 Inc requests that I provide some guidance to the parties so as to assist with redetermination efforts.

[74] 443 Inc did not strenuously contest before me the Minister's position that once she formally exercises her discretion not to reassess that decision is *res judicata*. If that is the case, and in the event the Minister proceeds with issuing a clear decision along these lines rather than a decision to postpone reassessment to a later date, the consequences may be that 443 Inc's fate is sealed as regards the treatment of its Amended Returns regardless of how the common issue may be resolved in the future by the TCC.

[75] If she is to exercise her discretion in that way thus setting in stone and finally determining the assessments of 443 Inc, I would expect the CRA to directly and clearly address its application of alternative assessing positions and the effect of Interpretation Bulletin IT335R2 in its letter to 443 Inc, and explain why, if that is the case, the policy is not being followed. In addition, the Minister cannot have it both ways. And with funds already in hand for the taxation years 2008 to 2011, the reasonable corollary decision would be for Minister to take a consistent position in respect of Mr. Ludmer's appeal of his reassessments as regards the 2008 to 2011 taxation years. This cannot become an "I gotcha" situation.

[76] Along the same lines, nor can 443 Inc continue to hold the proverbial Sword of Damocles over the head of the CRA, bringing it down whichever path the CRA decides to take. For the policy to which 443 Inc rails at the Minister for having breached to apply, there must be, as 443 Inc itself concedes, a final determination on the treatment of how the Distributions for the 2008 to 2011 taxation years are to be treated.

[77] I therefore leave the matter to the parties. If resolution is not possible, 443 Inc has already advised that it intends to pursue its application for an order in *mandamus*. That being the case, the questions as to whether, and to what extent, the Minister can depart from past internal policy, whether the Minister is even obligated to process the Amended Returns and issue notices of reassessment, or whether this is simply a matter of discretion on her part, are best left to the judge hearing the *mandamus* application; it is not for me to tie the judge's hands with a finding of my own on these issues.

JUDGMENT in T-938-19

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Attorney General of Canada as the proper Respondent.

2. The Decision of the Canada Revenue Agency [CRA] dated May 7, 2019, is hereby quashed and set aside.

3. Costs are payable by the Respondent to the Applicant.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-938-19
STYLE OF CAUSE:	4431472 CANADA INC. v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 11, 2021
JUDGMENT AND REASONS:	PAMEL J.
DATED:	AUGUST 3, 2021

APPEARANCES:

Doug Mitchell Miriam Clouthier David Grossman	FOR THE APPLICANT
Ian Demers Amélia Fink	FOR THE RESPONDENT

SOLICITORS OF RECORD:

IMK LLP Montréal, Québec	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT